2-18-1976

Charles E. Jenkins v. Commonwealth of Kentucky

Reply Brief 1975-SC-0752

REPLY BRIEF

3821

SUPREME COURT OF KENTUCKY

FILE NO. 75-752

CHARLES E. JENKINS — APPELLANT

VS. APPEAL FROM HENDERSON CIRCUIT COURT
HON. CARL D. MELTON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed, postage prepaid, to Hon. Carl D. Melton, Judge, Henderson Circuit Court, Henderson County Courthouse, Henderson, Kentucky 42420; Hon. Ulvester Walker, Commonwealth Attorney, 2nd Judicial District, Henderson, Kentucky 42420; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 18th day of February, 1976.

Timothy T. Riddell

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MAY IT PLEASE THE COURT:

PURPOSE OF THIS REPLY BRIEF

To respond to those Arguments found in Brief For Appellee.

QUESTIONS TO WHICH THIS BRIEF ADDRESSED

I.

DID THE TRIAL COURT COMMIT AN ERROR OF REVERSIBLE MAGNITUDE WHEN IT OVERRULED APPELLANT'S MOTION FOR A CONTINUANCE?

II.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT OVERRULED APPELLANT'S MOTION FOR A SEPARATE TRIAL ON THE NONRELATED COUNTS OF INDICTMENT NO. 74-124?

III.

DID THE TRIAL COURT DENY APPELLANT A FAIR AND IMPARTIAL TRIAL WHEN IT OVERRULED APPELLANT'S PRETRIAL MOTION TO RECUSE THE TRIAL JUDGE?

IV.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT PRECLUDED APPELLANT FROM INTRODUCING EVIDENCE THAT THE PROSECUTION'S STAR WITNESS HAD BEEN COURT MARTIALED IN THE ARMY FOR A THEFT?

V.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT FAILED TO GRANT A MISTRIAL AFTER THE COMMONWEALTH HAD INTRODUCED INCOMPETENT AND HIGHLY PREJUDICIAL EVIDENCE?

VI.

WAS APPELLANT DEPRIVED OF DUE PROCESS OF LAW WHEN THE TRIAL COURT ALLOWED THE JURY TO CONVICT HIM OF TWO COUNTS OF BEING A HABITUAL CRIMINAL UNDER AN INDICTMENT THAT CHARGED ONLY ONE COUNT OF BEING A HABITUAL CRIMINAL?

ARGUMENTS

I.

THE TRIAL COURT COMMITTED AN ERROR OF REVERSIBLE MAGNITUDE WHEN IT OVERRULED APPELLANT'S MOTION FOR A CONTINUANCE.

Appellee (in his assignment of error IV) admits that Appellant's trial counsel only had the opportunity to talk to Appellant one time before trial and that Appellant's trial counsel had tried five cases in March before the date of Appellant's trial, March 12 (Brief For Appellee, p. 6). However, even when confronted with these undisputed facts, Appellee inexplicably argues that "[i]t appears that counsel had time to familiarize himself with the case" Id.

Even assuming that Appellant's trial counsel did somehow find the time to merely "familiarize" himself with Appellant's case, as this Court well knows this would not be sufficient to afford Appellant an effective representative.

> Adequate preparation by an attorney [for] one charged with a crime includes full consultation with his client, interviews with prospective witnesses, study of the facts and the law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during the trial. Nelson v. Commonwealth, 295 Ky. 641, 175 S.W.2d 132, 133 (1943).

In support of his contention that the trial court did not abuse its discretion in denying Appellant's Motion For A Continuance, Appellee cites the case of Scillion v. Commonwealth, Ky., 508 S.W.2d 307 (1974). In the cited case Scillion was tried on February 27, 1973. Counsel was appointed to represent him a month before but Scillion's friends saw fit to retain counsel for him. Said counsel took control of Scillion's case only five days before trial. This Court, in holding that the trial court's denial of the retain counsel's motion for a continuance was not an abuse of discretion, rested its decision on the fact that Scillion presumably waited "until near the trial date to retain counsel." Id., at 309.

In this case, Appellant, being an indigent without the same kind of friends that Scillion had, had to rely on an overworked public defender. Obviously none of the facts that militated against Scillion can be found in this case. Accordingly, Scillion v. Commonwealth, supra cannot, by any stretch of the imagination, be deemed as controlling the outcome of the issue herein.

Appellee's assault on that part of Appellant's argument that the trial court abused his discretion in denying the Motion For Continuance where pretrial publicity was shown warrants no response from Appellant. However, in passing, the appellate counsel for Appellant is totally perplexed at why Appellee cited the case of Schweinefuss v. Commonwealth, Ky., 395 S.W.2d 370 (1965) in support of his pretrial publicity counter argument.

II.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED HIM A FAIR TRIAL WHEN IT OVERRULED APPELLANT'S MOTION FOR A SEPARATE TRIAL ON THE NONRELATED COUNTS OF INDICTMENT NO. 75-124.

Appellant's appellate counsel is tempted not to dignify Appellee's feeble attempt to counter this assigned error with a reply. However two totally unsupportable statements made by Appellee can not go unassailed.

Appellee asserts that "[t]he acts underlying the various counts were acts of a similar nature, to-wit taking another person's property" (Brief For Appellee, p. 4).

Under Count IV of Indictment No. 74-124, Appellant was charged with conspiring to obstruct justice by attempting to destroy or conceal evidence of the murder of William Curtis Miller (to wit: hiding Miller's body)(T.R., p. 2). How the elements of this crime constituted a common scheme or plan with the three breakins charged in the first three counts of Indictment No. 74-124 is beyond the imagination of Appellant's appellate counsel. Nor could this crime be said to be "based on the same acts or transactions" (RCr 6.18) that resulted in the crimes charged in the first three counts.

Obviously this crime as well as the crime charged in Count V was not of the same or similar character as those charged in the first three counts. Thus the trial court should have granted Appellant's motion for separate trials on these charges. Its failure to do so allowed the Commonwealth to introduce into evidence, during a trial where Appellant was being prosecuted for three breakins, evidence of Appellant's involvement in a murder. This is exactly what this Court was seeking to avoid when it implemented RCr 9.16.

Appellee's second unsupportable assertion is that any prejudice that Appellant was subjected to by the trial court's denial of his Motion For Separate Trials was removed when the trial court "directed verdicts on the dwelling house breaking and one storehouse breaking" (Brief For Appellee, p. 4).

Appellee must have overlooked two important factors in making this bold assertion. First, on those crimes that the trial court did not direct a verdict Appellant was found guilty and was assessed the maximum penalty on each. Under the recent case of Cargill v. Commonwealth, Ky. 528 S.W.2d 735 (1975) this Court held that prejudice would be inferred when a trial court erred in denying a motion for a separate trial and when the jury assessed maximum penalties on the crimes for which a defendant was convicted.

Second, Appellee overlooked the case of Davis v. Commonwealth, Ky., 464 S.W.2d 250 (1970) wherein this Court totally undermined Appellee's assertion. In that case Davis was charged with seven crimes under one indictment. Three of the counts pertained to certain breakins. Three other counts involved either detaining a female or rape. The remaining count involved a robbery. Three of the charges did not make it to the jury and of the four other charges the jury found Davis guilty of only one and then assessed only the minimum punishment. In that case, even though Davis was not convicted of all the charges, it was apparent that Davis "was truly 'embarrassed or confounded' in his effort to defend against the multitude of charges against him" Id., at 253.

Despite this, the Commonwealth argued that since he was only found guilty of one crime and was assessed the minimum punishment then this undoubtedly removed any prejudice. This

Court rejected this contention out of hand and ruled:

> Neither is it an answer to suggest the absence of prejudice by reason of his acquittal on all but one charge, coupled with the jury's fixing the minimum punishment for the count upon which he was convicted. A persuasive argument can be made that these circumstances accentuate the prejudicial effect of the multiple charges, in that the jury may have concluded to convict appellant of "something" due to the adverse effect of so much incriminating evidence in so many separately stated episodes. Id.

In light of this Court's holding in Davis, Appellee's argument that the trial court's directing of verdicts removed any prejudice from that court's error of denying the motion for separate trials, is both legally and logically unsupportable.

III.

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL WHEN IT OVERRULED APPELLANT'S PRETRIAL MOTION TO RECUSE THE TRIAL JUDGE.

The tenor of Appellee's response (his assignment of error I) to this ARGUMENT does not necessitate a reply from Appellant except to note that this Court has ruled in Massie v. Commonwealth, 93 Ky. 588, 20 S.W. 704 (1892), that it is not necessary for the record to reflect the judge's bias or prejudice towards Appellant. As this Court stated in Massie:

> It is said the record, so far as the judge's rulings are concerned, indicates no hostility or prejudice against the appellant; but that is not the question, for the accused has the right to be tried by a judge that is fair and impartial; and when he has good reason to believe, supported by facts, that he will not afford him such trial, he should not be compelled to take chances of a trial before that judge in order that the truth of the matter may be developed, which may never be developed, because

> there are many ways that a partial or prejudiced judge may knife a party that he is trying, without it appearing from the record, or without his being able to ascertain the act. So, when the fact is made to appear by proper affidavits, the judge should then vacate, and it is a reversible error if he does not. Id.

IV.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT PRECLUDED APPELLANT FROM INTRODUCING EVIDENCE THAT THE PROSECUTION'S STAR-WITNESS HAD BEEN COURT-MARTIALED IN THE ARMY FOR A THEFT.

Appellee first counters (in his assignment of error III) that "the denial to utilize the military record was not error since only certain felonies can be used and it was not shown that this was in fact a felony" (Brief For Appellee, p. 5).

At the outset Appellant admits that there was no showing that this theft was a felony but Appellant is not to be penalized for this omission. The trial court should have determined whether or not this crime was admissible to impeach Svara in camera pursuant to Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970). However, the trial court refused to hold such a hearing because he ruled as a matter of law that evidence of a court martial was not admissible because of that court's erroneous belief that a court martial did not measure "up to our standards to impeach the witness" because of insufficient safeguards (T.E., pp. 407-408).

Thus, the failure of the record to demonstrate that the theft for which Svara was court martialed was a felony, can not be deemed to be the fault of Appellant for he was precluded from doing so by the erroneous ruling of the trial court. In this light it would only be logical and fair to assume that this crime was a felony.

Appellee finally argues that if the trial court erred in not permitting Appellant to effectively confront Svara this error certainly would not be prejudicial in view of the fact that Svara admitted, while on the stand, to participating in other crimes. However, Appellee has apparently overlooked the Supreme Court's case of Davis v. Alaska, 415 U.S. 308 wherein that Court ruled in a similar case case that a denial of a right to effectively cross-examine an important state witness "would be constitutional error of the first magnitude and no amount of showing of want of prejudice could cure it" Id., at 318 (Emphasis supplied).

V.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE COMMONWEALTH HAD INTRODUCED INCOMPETENT AND HIGHLY PREJUDICIAL EVIDENCE.

Appellee argues that "the exposure of the jury to one void conviction does not amount to substantial error requiring reversal since there were still two convictions for the jury's consideration" (Brief For Appellee, p. 8).

At the outset, it was made clear during the trial that the two valid prior convictions were to be used for the limited purpose of enhancing Appellant's punishment for one of the principal offenses. On the other hand, the jury was not told why this void conviction was introduced but was only admonished not to pay this conviction any heed. As this Court has realized an attempt to unring the bell of prejudice by such an admonition clearly does not succeed. See Cotton v. Commonwealth, Ky., 454 S.W.2d 698, 701 (1970) and Cowan v. Commonwealth, Ky., 407 S.W.2d 695, 698 (1966).

Finally in answer to Appellee's contention that the error of introducing evidence that Appellant had been previously convicted of grand larceny, during a trial where Appellant was being tried on three counts of breaking and entering and one count of grand larceny auto, was non prejudicial, reference needs only to be made to this Court's holding in Alexander v. Commonwealth, Ky., 450 S.W.2d 808, 810 (1970):

> In view of the well-established rule against admitting evidence of other crimes, we may not indulge in speculation as to whether prejudice occurred as the result of the court's improperly admitting the evidence. It is patent that the only effect of the evidence was adverse to the appellant, not helpful.

VI.

APPELLANT WAS DEPRIVED OF THE PROCESS OF LAW WHEN THE TRIAL COURT ALLOWED THE JURY TO CONVICT HIM OF TWO COUNTS OF BEING A HABITUAL CRIMINAL UNDER AN INDICTMENT THAT CHARGED ONLY ONE COUNT OF BEING A HABITUAL CRIMINAL.

Appellee counters this ARGUMENT by contending that the trial court did not err in allowing the jury to convict Appellant of two counts of being a habitual criminal under an indictment that charged only one count because "Appellant was found guilty on one count of being an habitual criminal [and] [t]hat conviction was used to enhance the penalty on the two felony convictions" (Brief For Appellee, p. 9).

Appellee does not explain how he reached the conclusion that a conviction on one count of being a habitual criminal can be used to enhance the convictions for two separate other felony counts. Perhaps he failed to delineate his rationale because it is both legally and logically untenable.

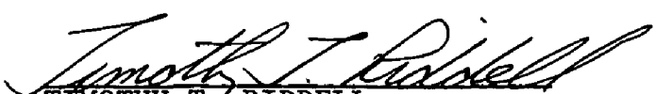
Appellant was only charged with one count of being a habitual criminal. That one count could have only been used to enhance the penalty for one principal offense. If the Commonwealth wanted to have every principal offense enhanced by a habitual criminal conviction it would have had to indict Appellant for more than a single count of that crime. This would have been perfectly permissible and would have precluded the raising of this issue.

The Commonwealth's failure to do so, combined with the trial judge's allowing the jury to use this single conviction to enhance the punishment for the two principal felony convictions, absolutely denied Appellant due process of law. Cole v. Arkansas, 333 U.S. 196 (1948).

CONCLUSION

Appellant, in this and in his original pleadings, has established that his convictions were procured erroneously and in violation of his basic rights. Accordingly this Court should reverse those convictions and should remand Appellant's case to the Henderson Circuit Court with directions to afford Appellant a fair trial.

Respectfully submitted,



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